



# HR in the East Midlands

December 2021

The year has seen us all as HR, L&D and professionals continuing to support our organisations, managers and colleagues with the ongoing challenges presented by the COVID pandemic. We are pleased to have had the opportunity to support you with these challenges, and thank you for the positive feedback you've given us during this time. We hope that 2022 brings better times and send our best wishes for health & happiness.

## Reminder: XpertHR Regional Deal 2022-23

A friendly reminder of the regional deal to access Xperthr - the online information service. EMC negotiates a discounted rate on behalf of member organisations and we can offer a price freeze for 2022-23, based on the current number of user licences.

The costs from April '22 to March '23 are:-

- Single User Licence - £820.00 per person + VAT. a **saving of 65%** per licence.
- Public Sector Site Access Fee - £160.00 per organisation + VAT. an **87% saving** per organisation.
- An optional extra is legal advice from Abbey Legal at £662.00 per person.

Contact Mila to join the scheme or renew your licences by **Friday 28th January 2022**, letting her know how many licences you require:

[mila.pereira@emcouncils.gov.uk](mailto:mila.pereira@emcouncils.gov.uk)

## Projects with Local Authorities

Over the last year, the direct support that organisations have used most often have been:-

- Mediation
- In-house workshops and action learning for managers and teams on hybrid and remote working
- Investigations
- Strategic HR support
- Coaching
- Support with complex cases
- Facilitation of Chief Executive appraisals

We have provided a range of other support over the year, with many organisations coming back to us to help with new issues – always a reliable indicator of positive feedback!

**To find out how EMC could support an area of work for you, then please contact Sam or Lisa.**

[Sam.Maher@emcouncils.gov.uk](mailto:Sam.Maher@emcouncils.gov.uk)

[Lisa.Butterfill@emcouncils.gov.uk](mailto:Lisa.Butterfill@emcouncils.gov.uk)

## EMC's Working Arrangements for the Festive Period

Our last working day this year will be Thursday 23<sup>rd</sup> December and will we be back to support you again from Tuesday 4<sup>th</sup> January 2022. Thank you for all your support during 2021 and we look forward to working with you in 2022.

# Learning & Development

## Free T Level Workshop – 20<sup>th</sup> January 2022

A free workshop is being held 20<sup>th</sup> January 2022 from 10.00-11.30. The workshop is being delivered by colleagues in the LGA and will explain T Levels and work placements. These can be a useful opportunity to develop relevant skills and build connections with our future workforce. For further information and to book a place please visit [here](#).

## Local Government Apprentice of the Year 2022

### Save the dates, 25-26 May 2022

This is a national event with participants across the country competing to become the Local Government Apprentice of the Year 2022. Further information about the event will be shared in the New Year and will feature in the January 2022 HR Bulletin.

In 2021, more than 100 local government apprentices came together to compete for the title of Local Government Apprentice of the Year 2021. During the event, apprentices faced six online activities, working within teams of people they had never met before.

The activities were based around a variety of disciplines, such as networking and enterprise. The day was designed to be action-packed and challenging, so that participants could show how they perform under pressure – both individually and within teams.

What participants said last time:-

*“It was a fast-paced, full-on, interactive day, but it was great to meet new people and be provided with the opportunity to learn and develop.”*

Our own Lisa Butterfill supported the event by acting as a Development Lead. Lisa reflected:

*“The event was a great opportunity to help support the apprentices as they immersed themselves in the challenges set. To see them grow in confidence and skill was very rewarding and it certainly raised the profile of how vital apprentices are within local government. It is a great opportunity to learn in a practical way and I would encourage anyone interested in the development of others to take part in future events. Looking forward to next year!”*

This national event is being jointly run by colleagues at East of England LGA and SW Councils.

## Employment Law Update 19<sup>th</sup> January 2022

### Have your employment law queries answered by Darren at a Tailored Employment Law Update

Darren will be providing a 2-hour update next month on key employment law developments, but also will focus on the issues that are directly concerning you. You can contact Sam to let her know what you would like Darren to include. It could be....

- how should we deal with employees who are worried about returning to the workplace?
- are those suffering from long-covid protected by the Equality Act?
- how should employers deal with the question of vaccination. Can we insist on employees getting vaccinated and what can we do if they refuse?

### What are your burning issues?! Let us know so it can be covered during the session.

The session will be from 10.00 to 12.15 and will incorporate a 15-minute break.

Places will be available at a cost for EMC members of **£65 per delegate**. We are also offering a discount for multiple bookings – so you will be able to **BUY ONE PLACE AND GET ANOTHER HALF PRICE**.

To book, please go to our website at the following link [here](#). You will need to provide a purchase order number.

### Contact Details

For further information about any of our work please contact the team:-

[Sam.Maher@emcouncils.gov.uk](mailto:Sam.Maher@emcouncils.gov.uk)  
[Lisa.Butterfill@emcouncils.gov.uk](mailto:Lisa.Butterfill@emcouncils.gov.uk)  
[Kirsty.Lowe@emcouncils.gov.uk](mailto:Kirsty.Lowe@emcouncils.gov.uk)  
[Mila.Pereira@emcouncils.gov.uk](mailto:Mila.Pereira@emcouncils.gov.uk)



## In Deep with Darren

This month, Darren Newman looks into the legal position of backdating pay when a pay award takes longer to agree.

**At EMC, we have often answered your queries on this issue. Longstanding regional/national employer advice is that employers are not obliged to contact ex-employees and offer back pay but if an ex-employee requests it, it should be paid. The general practice amongst councils is that it tends to be provided when someone requests it. It is interesting to see the legal perspective from Darren....**

After writing last month about the legal complications that can arise when an employer and trade union fail to reach agreement on pay, I have been asked an interesting question about what happens when a deal is eventually reached after a lengthy period of negotiation. It is usual in such cases for the new agreement to be backdated to the standard review date so that the length of time it has taken to reach an agreement does not result in employees being penalised. If backdating was not agreed then that would reduce the value of the award and make reaching an agreement that much harder.

But if employees who are in place when an agreement is reached are protected, the question is where that leaves former employees whose employment ended after the pay review date but before the new deal was agreed. Are they also entitled to a backdated award?

Apparently, such payments are common practice – but I don't think they are a legal obligation. This is a question of contractual entitlement and we have to look at what the contract requires at the relevant time – not what it would require at some stage in the future. Suppose new pay rates are normally effective from January each year, but negotiations often drag on for some months beyond that. What is an employee's entitlement in, for example, March? I would say it is the same rate of pay that applied in December. The union and the employer might agree at some stage on a backdated award - so that the employee should then

be given a payment that represents the difference between the old and new rates for that month. But that is a contractual obligation that only comes into existence when the new agreement is reached. The fact that the award is backdated does not retrospectively alter the contractual obligations in place in March – it merely creates a new contractual right to an additional payment representing the months lost to negotiations. As a new entitlement, it should only apply to current employees.

I have found some support for this argument in the case law – but I had to dig deep. In **Leyland Vehicles Ltd v Reston** (the name should give you a clue that this is a decision from 1981!) the issue was the entitlement of employees who were made redundant after the pay review date but before new rates had been agreed. It was standard practice for the new rates to be backdated and the employer had in fact given the employees an extra payment to represent the wages they would have been paid under the new rates. However when it came to the calculation of a redundancy payment, they calculated the 'week's pay' on which it was based on the basis of the old rate rather than the new one. The Employment Appeal Tribunal held that they were right to do so. A week's pay was the amount that the employee was entitled to under the contract of employment *in force on the day the employment came to an end*. On that date no pay increase had been agreed and so the old rate remained in place.

The Tribunal had held that there was an implied term in the contract of employment to the effect that the rate of pay in the months between the review date and the eventual agreement was the old rate *plus* whatever was eventually agreed. But the EAT held that there was no basis for implying such a term. I think that must be right. If we are going to imply a term based on custom and practice it should at least be possible to determine what the employer's obligations are on any given day. If we are to say that the contract requires the employer to pay the employee an unspecified amount at some unspecified point in the future once a deal is reached then that seems to me to be too uncertain to amount to a contractual obligation.



It is also difficult to see how a contractual obligation can come into being or change when there is no longer a contract in place. It is not unheard of for some contractual obligations to continue after the contract has ended. The right to appeal against dismissal can be an enforceable contractual right even if the dismissal has already taken effect and, in many industries, ex-employees are subject to ongoing contractual obligations not to compete with their former employer. But such terms are normally set out expressly in the contract. Implying a term into current contracts based on how ex-employees have been treated in the past seems to me to be something else entirely and altogether too much of a stretch.

I imagine that there are many trade unions lawyers who would vigorously disagree with my analysis – and they might be right. One EAT decision from 1981 is nowhere near enough to consider the matter closed. But even if some sort of contractual obligation to pay backpay to former employees can be found, recovering such sums might not be straightforward. A failure to pay backpay to an ex-employee is not in my view an unlawful deduction from wages because that depends on someone who is employed by the employer being paid less than the amount that is properly payable on that occasion. When the employer fails to pay the amount of backpay that is due, the employee is no longer employed and so the failure to make the payment is not a deduction as that term is defined by the Employment Rights Act. That only leaves a breach of contract claim – and such claims can only be brought in the employment tribunal in respect of claims that either arise or are “outstanding” on the termination of employment. Even if there were some kind of contractual obligation to pay backpay to ex-employees, the employer would not be in breach of it until after the agreement had been reached. This means that a breach of contract claim could only be brought in the normal civil courts.

Whether employers should continue any practice they may have of paying backpay to ex-employees is of course a matter for them. It is not just a question of legal obligation but of good employment relations. The extent to which unions and current employees will be concerned about the treatment of former colleagues who miss out on the benefits of a pay deal should not be underestimated. As a lawyer I would appreciate a clear ruling from the Court of Appeal on the issue, but the process of getting there might well end up

costing more than continuing to make the payments on an ex-gratia basis.

## National Developments

### COVID-RELATED NEWS

#### COVID Workforce Update from the Regional Employers and the LGA

With rising cases of COVID, it is timely for us to provide a further issue of our COVID workforce update – developed by the LGA, East Midlands Councils and our counterparts in other regions. You can access a copy here:- [workforce covid update](#)

#### Temporary Change to SSP Fit Note Timescales

From 17<sup>th</sup> December, the Government’s guidance has temporarily changed relating to the timescales for requiring Fit Notes. It applies to absences started from 10<sup>th</sup> December and aims to free up GP and NHS capacity to support the COVID booster vaccination programme and emergency care.

It means that for the purposes of SSP, employees will not be required to provide their employer with medical evidence of sickness absence for the first 28 days’ absence. GPs still need to supply fit notes for periods of absence exceeding 28 days. A link to the updated guidance can be accessed via this link: [Statutory Sick Pay Guidance](#) The relevant paragraph has been extracted and provided below:-

If an employee goes off sick on or after 10 December 2021, up to and including 26 January 2022, you cannot ask them for proof of sickness until they have been off for 28 days or more

Whilst contractual sick pay in most cases is considerably more than SSP and therefore has its own contractual requirements in respect of providing certified medical evidence, many employees could find it very difficult to produce such medical evidence during this period. **Employers should therefore act reasonably in seeking medical evidence during this time.**



## NJC Circular on Working from Home

On 9<sup>th</sup> December we circulated the latest NJC circular following the Government's announcement on its guidance to return to working from home where possible. A copy can be accessed [here](#)

## Updated FAQs

The LGA has updated the FAQ page on their website relating to workforce issues arising from the COVID response. The changes have been made following the reintroduction of working from home and other changes in response to the Omicron variant in England from 13 December 2021 which you may find useful.

Please continue to raise your queries with us at EMC. Your issues are used to help inform and develop the LGA's guidance. You can access the FAQ page here: [FAQs](#)

## DFE's Actions for Schools

The DFE's document setting out actions for schools relating to COVID has been updated – most recently on 14<sup>th</sup> December. You can access it through the following link: [school actions](#)

## Pay Negotiations

The following provides a brief update on the latest position on pay.

### Soulbury Officers (Soulbury Committee)

The National Employers increased and have made a final offer of a 1.75% pay increase to the Officers' Side. The Officers' Side (NEU, Prospect and AEP) has now rejected the offer but there is no intention to move to a ballot on industrial action. The National Employers will be meeting in early January to consider next steps.

### Youth and Community Workers (JNC Youth and Community Workers)

The National Employers made a final offer of a 1.75% pay increase to the JNC Staff Side in August. In November the Staff Side formally rejected the offer and confirmed that Unite would undertake an industrial action ballot in January with a timetable in line with Green Book staff. The other Unions on the Staff Side (UNISON, NEU and UCU) have yet to confirm their ballot timetables.

## Green Book, Craftworkers, Chief Officers, Chief Executives

You will be aware of the ongoing ballots being conducted by unions relating to Green Book employees and Craftworkers. The timescales for these were outlined in our HR Bulletin last month.

The Employers' Side of the NJC is due to meet on 31<sup>st</sup> January 2022. It will include consideration of the negotiation for Chief Officers and Chief Executives.

### School teachers' pay 2022/23

The School Teachers' Review Body (STRB) remit that this year covers a 2- year pay period (2022/23 & 2023/24) has now **been published**.

The LGA is consulting with local authorities to inform the national employers (**NEOST**) response to the STRB. Councils can have their say by completing the online survey – one response per authority. The survey is being launched imminently and responses will be required by 21 January 2022.

## Employing Overseas Workers

This month marked the anniversary of the launch of the points-based immigration system's Skilled Worker route. With changes taking place to UK immigration routes, the Home Office recently refreshed its employers' guide. It provides an overview of the points-based immigration system work routes and sets out the steps employers should take to access the system. It can be accessed here: [guide](#)

### Skilled Worker Eligibility Checker Tool

The Home Office has launched a new Skilled Worker Eligibility Checker (SWEC) tool which enables applicants and employers to immediately see if vacancies are eligible for a Skilled Worker visa. The tool can be found [here](#)

### Priority Visa Services

From 1<sup>st</sup> December, the Government extended its priority visa services so they are now available to EU nationals holding a biometric passport from an EU country (including Iceland, Liechtenstein, Norway or Switzerland), and who are submitting applications via



the [UK Immigration: ID Check app](#) in the following routes: [Skilled worker](#), [Health and Care worker](#), and [Student](#).

Further information on getting a faster decision using priority visa services can be found on gov.uk: <https://www.gov.uk/faster-decision-visa-settlement>.

## National Graduate Development (NGDP) programme

Applications are now open for the next cohort of the National Graduate Development programme. Applications for candidates will close on 5 January 2022 and organisations have until the end of March 2022 to sign up for next year's in-take.

The NGDP is ranked number 50 on 'The Times Top 100 Graduate Employers' for 2021/22. [Find out more about the NGDP](#) or email [ngdp@local.gov.uk](mailto:ngdp@local.gov.uk) with any enquiries.

## Apprenticeships

The latest LGA apprenticeship newsletter can be found [here](#). It covers developments in the world of apprenticeships, including:-

- IFATE Postpones Flexibility Switch-Off in Light of New COVID Guidelines
- Public Sector Target Data Published: Starts down in 20/21, but up across the four-year period; Most councils miss their target
- Apprenticeship Incentives: Application Period Set to Open on 11 January
- Pooled PAYE: Latest Update
- SENCO Apprenticeship Standard Development Update
- LGA Apprenticeships Mapping Tool Update
- LGA Apprenticeship Surgeries and Webinars

